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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ELVIN LEE HUDSPETH, JR., Defendant and Appellant.	B201522 (Los Angeles County Super. Ct. No. MA032085)
In re ELVIN LEE HUDSPETH, JR., on Habeas Corpus.	B208123

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas R. White, Judge. Appeal dismissed; petition denied.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Blythe L. Leszkay, Deputy Attorneys General, for Defendant and Appellant.

Elvin Lee Hudspeth, Jr., pled guilty to first degree murder (Pen. Code, § 187) and admitted a gun-use enhancement (Pen. Code, § 12022.53, subd. (b)). On appeal, he argues that he received ineffective assistance of counsel. We dismiss the appeal because (1) Hudspeth did not obtain a certificate of probable cause (Pen. Code, § 1237.5), and (2) Hudspeth forfeited his appellate rights when he pled guilty.

Hudspeth also petitions for writ of habeas corpus, contending his trial counsel was ineffective in failing to investigate an alibi defense. He also argues that his plea was the result of threats to his wife and other family members. Neither argument has merit, and we therefore deny his petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Information and Preliminary Proceedings*

By information, Hudspeth was charged with the murder of Keennen Gordon.[1] It was alleged that Hudspeth intentionally discharged a firearm within the meaning of Penal Code section 12022.53, subdivisions (b), (c), and (d) and that the crime was committed for the benefit of a street gang within the meaning of Penal Code section 186.22.[2]

Hudspeth pled not guilty. On January 11, 2007, the court granted a section 995 motion and dismissed the gang allegations.

II. *Preliminary Hearing*

At the preliminary hearing, Robin H. testified that, on May 28, 2005, at approximately 11:30 p.m., she saw appellant driving a green Mazda; he made a U-turn and returned to her house. Robin's niece, Miesha S., and Gordon were outside the house. Robin heard Gordon say, "Are you going to kill me?" Robin heard shots and saw sparks.

Detective Karen Shonka testified that the day after the killing Miesha told her Hudspeth shot Gordon six times.

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[1] The information contains the spelling Keennen. The reporter used the spelling Keenan.

[2] Undesignated statutory citations are to the Penal Code.

III. *Jury Trial*

A jury trial began on June 21, 2007.

Robin testified she had known appellant Hudspeth for a long time and had known victim Gordon for one or two years. Robin was friends with appellant and had observed him with a gun on multiple occasions. On May 28, 2005, at about 11:30 p.m., Robin saw appellant drive by the front of her house in Lancaster. Appellant made a U-turn and returned to Robin's house. Gordon, who was outside with Miesha, said to appellant, "What's the problem with us[?]" and then said, "You're going to kill me? You just going to kill me?"

Robin then heard gunshots and saw Gordon lying on the ground. Appellant sped off. After the shooting, appellant called Robin and told her not to come to court if it was not required. Robin did not want to testify.

Robin had been convicted of commercial burglary, petty theft, and counterfeiting. In the past she used drugs, but had not done so for three or four years. During cross-examination, Robin acknowledged that she did not see appellant holding a gun.

Robin's niece, Miesha, testified for the prosecution. She had known appellant for approximately 10 years. On May 28, 2005, she was in front of her grandmother's house (Robin's mother's house) and was talking to Gordon. She saw a car make a U-turn and, when the car returned, she saw appellant driving with two passengers. Miesha did not complete her testimony before appellant pled guilty.

IV. *Plea and Judgment*

On July 2, 2007, appellant pled guilty to murder (§ 187, subd. (a)) and to a gun-use enhancement (§ 12022.53, subd. (b)). Appellant indicated he understood he would be sentenced to 35 years to life in prison. He stated that he understood his maximum exposure if he continued with trial was 50 years to life because the prosecution would proceed under section 12022.53, subdivision (d) instead of section 12022.53, subdivision (b).

Appellant waived (1) his right to a jury trial; (2) his right against self-incrimination; (3) his right to confront and cross-examine witnesses; and (4) his right to

subpoena witnesses and present a defense. Appellant stated that no one had threatened him or anyone close to him to persuade him to plead guilty. He stated that he was pleading guilty freely and voluntarily. Appellant also waived his appellate rights, which the prosecutor explained as his right to appeal his case to an appellate court.

The court found the waivers to be knowingly and voluntarily given. The court found appellant guilty and sentenced him to a total 35-year-to-life sentence, consisting of 25 years to life as to the murder count and an additional 10 years for the enhancement. The remaining section 12022.53, subdivision (d) enhancement was stricken. Appellant filed a timely notice of appeal without obtaining a certificate of probable case.

V. *Petition for Writ of Habeas Corpus*

In support of his petition for writ of habeas corpus, Hudspeth included his declaration and the declaration of his wife, Juanita.

In his declaration, Hudspeth averred all of the following: (1) he informed his trial counsel that he was at work as a security guard in Las Vegas when the offense occurred; (2) he caused payroll records to be sent to his trial attorney; (3) his trial counsel did not hire an investigator; (4) his trial counsel was not experienced in felony trials; and (5) his trial counsel encouraged him to accept a plea bargain. According to Hudspeth, his trial counsel believed that a jury would not find the alibi credible.

Hudspeth also declared that his wife and family members received threats from the victim's family and friends who are members of a gang. Hudspeth advised his attorney of the threats, which caused his mother to relocate. Hudspeth agreed to accept the plea "[o]ut of fear for my family's safety," and because of his "attorney's failure to prepare a defense."

Juanita declared that men wearing blue clothes, who appeared to be gang members, said "angry things" to her. Once she was followed from court by someone "driving crazy," but the person drove away without hurting her. Juanita's mother and Hudspeth's mother were afraid. Juanita recommended Hudspeth plead guilty because she "was afraid these people might harm us if he did not."

DISCUSSION

On appeal, Hudspeth argues that his trial counsel was ineffective for encouraging him to plead guilty in exchange for a sentence that had no practical difference to the maximum possible sentence and for failing to advise him that he could not be sentenced under the street gang allegation. In his reply brief, Hudspeth argues that his trial attorney rendered ineffective assistance of counsel when he failed to obtain a certificate of probable cause.

In his petition for writ of habeas corpus, Hudspeth argues that his counsel was ineffective for failing to present an alibi defense and that his plea was involuntary.

The Attorney General disputes each contention.

I. *Standard for Ineffective Assistance of Counsel*

The standard for ineffective assistance of counsel in the context of a guilty plea is the same as the standard following a criminal trial. (*Hill v. Lockhart* (1985) 474 U.S. 52, 58.) Hudspeth bears the burden to show "'first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] . . . If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966; see also *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).)

In the context of a guilty plea, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart, supra*, 474 U.S. at p. 59.) "[W]here the alleged error of a counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him

to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." (*Ibid*.)

"'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" (*Wiggins v. Smith* (2003) 539 U.S. 510, 521, quoting *Strickland, supra*, 466 U.S at pp. 690-691.)

"A reviewing court need not determine '"whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."'" (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1325.)

II. *Hudspeth's Appeal Is Not Cognizable*

For two reasons, Hudspeth's appeal is not cognizable. First, Hudspeth did not obtain a certificate of probable cause. Second, Hudspeth waived his appellate rights.

Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." "The objective is to promote judicial economy 'by screening out wholly frivolous

guilty [and nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court.'" (*People v. Panizzon* (1996) 13 Cal.4th 68, 75-76.)

In his reply brief, Hudspeth acknowledges the requirement of a certificate of probable cause. His sole response to the requirement is that "he was denied minimally effective assistance of counsel." His unsupported statement is insufficient to show ineffective assistance, which requires that he show both deficient conduct and prejudice. (*People v. Lopez, supra*, 42 Cal.4th at p. 966; see also *Strickland*, *supra*, 466 U.S. at p. 688.) Assuming that counsel was deficient for failing to obtain the statement of probable cause, Hudspeth makes no claim that if counsel had sought such a certificate, there was a reasonable probability it would have issued. Thus, he shows no prejudice.

The Attorney General argues that, in addition to failing to obtain the required certificate of probable cause, Hudspeth also forfeited his appellate rights. We agree. Before Hudspeth pled guilty, the prosecutor stated: "Also, I will be taking a waiver of appellate rights which means that once you are sentenced in this case . . . once I take the plea . . . you will be waiving your right to appeal this case to an appellate court . . . ." The prosecutor asked Hudspeth if he understood and Hudspeth answered affirmatively. The prosecutor then asked Hudspeth if he agreed to waive his appellate rights, and Hudspeth answered affirmatively.

In *People v. Panizzon*, *supra*, 13 Cal.4th 68, our Supreme Court found a forfeiture of appellate rights where the defendant signed a document, which included the following paragraph: "'I hereby waive and give up my right to appeal from the sentence I will receive in this case.'" (*Id.* at p. 82.) The high court distinguished *People v. Rosso* (1994) 30 Cal.App.4th 1001, a case relied upon by Hudspeth. In *Rosso*, the appellate court found no forfeiture where the only mention of appellate rights was the court's question to defendant if he waived those rights. Here, because the prosecutor explained appellate rights to Hudspeth, asked Hudspeth if he understood those rights and if he agreed to waive those rights, this case is more like *Panizzon* than *Rosso*. We conclude Hudspeth

intentionally relinquished a known right. (*Rosso*, at p. 1006.) Thus, the appeal is not cognizable for this second reason.[3]

III. *Hudspeth Has Not Shown Ineffective Assistance of Counsel by Counsel's Failure to Present an Alibi Defense*

In his petition for writ of habeas corpus Hudspeth argues that his counsel failed to investigate his alibi defense. He argues that he was prejudiced because he was deprived of a potentially meritorious defense.

Hudspeth fails to show deficient conduct. It is clear that an attorney has a duty to investigate. (*Wiggins v. Smith*, *supra*, 539 U.S. at pp. 521-522.) But Hudspeth's assertion that his attorney failed to investigate his alibi is belied by his other averments. Specifically, in his declaration in support of his petition for writ of habeas corpus, Hudspeth avers that his trial attorney "was of the opinion that jury would not believe my alibi." Thus, the record indicates that trial counsel was aware of the alibi and found it lacked credibility, which provides a sound tactical reason for choosing to recommend a plea bargain. "'"[W]e accord great deference to counsel's tactical decisions' [citation], and . . . "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible,

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[3] Even if we were to consider the ineffective assistance of counsel claim in Hudspeth's appeal, we would conclude it has no merit. There is no support for his statement that he was misled into believing the gang enhancement might add time to his sentence. The prosecutor explained that the 35-year calculation was based on the murder and the gun-use enhancement and the gang allegation had been dismissed long before trial. Hudspeth also stated that he understood that if he went to trial his maximum was 50 years to life, but if he pled his maximum would be 35 years to life.

Hudspeth states that the "practical difference in appellant receiving a sentence of 35 years-to-life and 50 years-to-life is nil." Appellant received a 15-year reduction in his minimum sentence and his unsupported statement that he received no benefit as the result of his plea is insufficient to show either his attorney's deficient conduct or prejudice. In addition, there is no evidence that Hudspeth would have pleaded not guilty and insisted on going to trial. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 60.)

and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

Hudspeth also states that his attorney never hired an investigator. The total failure to investigate and prepare a defense in a murder trial is deficient conduct. (*Turner v. Duncan* (1998) 158 F.3d 449, 456.) But assuming Hudspeth's statement that no investigator was hired to be true, it does not show that his attorney did not conduct any investigation. In *Turner*, the habeas petition included a declaration by the defense counsel acknowledging that "he made no attempt to find or interview any prosecution or defense witnesses" and did not review any file provided by the public defender. (*Id.* at p. 453.) He also admitted that he "conducted no discovery and did no legal research in preparation for the case." (*Ibid*.) Here no similar evidence has been submitted in support of Hudspeth's petition.

Hudspeth forfeited his right to present a defense when he pled guilty. He fails to provide any evidence that his decision to plead was the result of his counsel's failure to investigate his claim that he was in Las Vegas. Nor does he present any evidence that the investigation of his employment in Las Vegas would have led counsel to change his recommendation as to the plea. (*Hill v. Lockhart*, *supra*, 474 U.S. at p. 59.) Thus, Hudspeth has failed to demonstrate prejudice, the second prong of an ineffective assistance of counsel claim.

Even if we assume that Hudspeth's argument that he was deprived of a potentially meritorious defense is relevant in this case where he pled guilty, the argument is unsupported and has no merit. The testimony against Hudspeth was overwhelming. Two eyewitnesses, both of whom had known Hudspeth prior to the killing, identified him. Robin testified that she heard the victim ask, "You're going to kill me?" heard gunshots, and then saw appellant drive away quickly. Miesha testified that she knew both Hudspeth and the victim. At the preliminary hearing, there was testimony that Miesha identified Hudspeth as the shooter the day after the incident. (Miesha did not complete her testimony at trial because Hudspeth pled guilty.)

In light of this strong testimony by eyewitnesses who both knew and were friendly with Hudspeth, there was little chance that a defense that Hudspeth was not in California at the time of the killing would have been persuasive. The absence from the record of any evidence supporting Hudspeth's assertion that he was in Las Vegas at the time of the killing reinforces this conclusion. Hudspeth does not aver that he was willing to testify if he had gone to trial or that any other witness would have testified in support of his alibi.[4] Hudspeth's acknowledgement that his counsel found the alibi unpersuasive further undermines his claim that a jury would have found it persuasive.

IV. *There Is No Merit To Hudspeth's Argument that His Plea Was Involuntary Because It Was the Result of Threats to His Family*

Hudspeth argues that his plea was involuntary because it was induced by threats made against him and his family members. This claim is procedurally barred because it is based on facts known to Hudspeth at the time of trial that he failed to raise during trial. (*In re Seaton* (2004) 34 Cal.4th 193, 196-197 (*Seaton*).)

Hudspeth is not foreclosed from arguing that, by failing to object to the voluntariness of his plea, his counsel rendered ineffective assistance of counsel. (*Seaton, supra*, 34 Cal.4th at p. 200.) But Hudspeth has not shown any deficient conduct. When his plea was taken, he was asked, "Has anyone threatened you or anyone close to you to get you to plead guilty in this case?" He responded, "No." When asked if he was "pleading freely and voluntarily," he responded, "Yes." The court found the plea to be voluntary.

Hudspeth does not show that ineffective assistance of counsel affected his ability to enter a voluntary and intelligent plea. Nor does he show a reasonable probability that but for his counsel's errors, he would not have pled guilty and insisted in going to trial. Therefore, Hudspeth has failed to show either prong of ineffective assistance in

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[4] The probation report indicates that a juvenile court found true Hudspeth committed a voluntary manslaughter.

connection with the voluntariness aspect of his plea, the sole issue which is not procedurally barred.

Hudspeth argues that he accepted the offer to plead out of fear for the safety of his family, "who would be required to testify in my behalf at trial . . . ." The argument is irrelevant because his claim is procedurally barred, but even if we assume relevance, it has no merit. Hudspeth's unsupported assertion provides no nexus between the threats and the plea. As the Attorney General argues, there is no explanation of how the threats induced the plea. There is no reason why Hudspeth could not have presented a defense without his family members in court and despite the relocation of his mother. Hudspeth's claimed alibi that he was employed in Las Vegas did not require the testimony of his family members. Therefore, even assuming that Hudspeth's family members had been threatened, there is no support for Hudspeth's conclusory statement that the threats caused him to plead guilty.[5]

DISPOSITION

The appeal is dismissed. The petition for writ of habeas corpus is denied.

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O'NEILL, J.[*]

We concur:

FLIER, Acting P. J. BIGELOW, J.

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[5] We agree with the Attorney General that a close reading of the declarations reveals no specific threat to Hudspeth or to his family.

[*] Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.